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CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

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AMERICAN BANKERS ASSOCIATION, THE FINANCIAL SERVICES ROUNDTABLE, and CONSUMERS BANKERS ASSOCIATION,

Plaintiffs,

v.

BILL LOCKYER, in his official capacity as Attorney General of California, HOWARD GOULD, in his official capacity as Commissioner of the Department of Financial Institutions of the State of California, WILLIAM P. WOOD, in his official capacity as Commissioner of the Department of Corporations of the State of California, and JOHN GARAMENDI, in his official capacity as Commissioner of the Department of Insurance of the State of California,

Defendants.

NO. CIV. S 04-0778 MCE KJM

MEMORANDUM AND ORDER

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Plaintiffs American Bankers Association, The Financial Services Roundtable, and Consumers Bankers Association

("Plaintiffs") have sued various California state officials (Attorney General Bill Lockyer, Department of Insurance Commissioner John Garamendi, Commissioner of the Department of Corporations William P. Wood, and Commissioner of the Department of Financial Institutions Howard Gould) in an attempt to prevent certain provisions of California law dealing with the dissemination of personal financial information from taking effect. Defendants Lockyer and Garamendi now move to dismiss Plaintiff's complaint for failing to state a claim upon which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6).[1] Plaintiffs have concurrently moved for summary judgment, arguing that the California law in question is expressly preempted by federal statute. Defendants Gould and Wood, in response, have filed a cross-motion for summary judgment on essentially the same grounds as the aforementioned Motion to Dismiss filed on behalf of Defendants Lockyer and Garamendi. Because all parties agree that this matter hinges on a legal question of preemption with no disputed factual contentions,[2] the Court elects to treat Lockyer and Garamendi's request for dismissal as a Motion for Summary Judgment under Rule 56, and will resolve the matter by way of cross motions for summary judgment. For the reasons set forth below, the Court determines that Plaintiffs' lawsuit is legally untenable and accordingly grants summary judgment in favor of the Defendants.

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[1]Unless otherwise noted, all references to "Rule" or "Rules" are to the Federal Rules of Civil Procedure.

[2]As pointed out in Plaintiffs' Opposition to Defendant Wood and Gould's Cross-Motion for Summary Judgment (p. 1, n. 1), Plaintiffs do not dispute the undisputed facts proffered by Wood and Gould in support of said motion, and Wood and Gould, in turn, do not dispute Plaintiffs' factual assertions, agreeing that the facts here are uncontroverted, "thus leaving this case a question of law." (Wood and Gould's Opposition to Plaintiff's Motion for Summary Judgment, 5:12-15). In addition, Defendants Lockyer and Garamendi concede that the same disputed legal issues are dispositive of both Plaintiffs' Motion for Summary Judgment and their Motion to Dismiss. (See Defendants' Reply memorandum, p. 1).

BACKGROUND

In 2003, California enacted the California Financial Information Privacy Act, which becomes operative on July 1, 2004 as California Financial Code sections 4050-4059. Known popularly as "SB1" after the Senate Bill which introduced the legislation, SB1 imposes certain restrictions on the dissemination of personal financial information both between affiliated business institutions and as to non-affiliated third parties.

In requiring that consumers be given control over the transmittal of such financial information, either through "opt-out" provisions in the case of affiliated institutions or express consent for disclosure to non-affiliates, SBI affords greater privacy protection than federal legislation. Title V of the Gramm-Leach-Bliley Act of 1999, 15 U.S.C. §§ 6801-6809 ("GLBA"), expresses congressional will that "each financial institution has an affirmative and continuing obligation to respect the privacy of its customers and to protect the security and confidentiality of those customer's nonpublic personal information." 15 U.S.C. § 6801(a). The GLBA requires every financial institution to provide, at least annually, a clear and conspicuous disclosure of its policies and practices regarding the disclosure of customers' personal information to both affiliates and to non-affiliated third parties. 15 U.S.C. § 6803(a)(1). With respect to non-affiliate disclosure, the GLBA requires that consumers be afforded the opportunity to direct that their personal information not be disclosed.

Because § 6807(b) of the GLBA expressly allows states to enact consumer protection statutes providing greater privacy protection, California contends that its passage of SB1 was proper. GLBA's savings clause in that regard provides as follows:

> (b) Greater protection under State law. For purposes of this section, a State statute, regulation, order, or interpretation is not inconsistent with the provisions of this subchapter if the protection such statute, regulation, order, or interpretation affords any person is greater than the protection provided under this subchapter....

Plaintiffs' complaint, on the other hand, seeks to invalidate SB1 by arguing that its provisions are expressly preempted by the Fair Credit Reporting Act, 15 U.S.C. §§ 1681-1681x ("FCRA"), and that consequently SB1 violates the Supremacy Clause of the United States Constitution. Although the stated purpose of the FCRA is to protect consumers from unfair or inaccurate credit reporting, rather than information sharing more generally, Plaintiffs seize on a preemption provision within the statute that they argue prohibits state regulation of any information sharing between affiliates:

> "No requirement or prohibition may be imposed under the laws of any State-
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> ....
>
> (2) with respect to the exchange of information among persons affiliated by common ownership or common corporate control, except that this paragraph shall not apply with

> respect to subsection (a) or (c)(1) of section 2480e of title 9, Vermont Statutes Annotated (as in effect on September 30, 1996).....

15 U.S.C. § 1681t(b)(2).

Plaintiffs further seek injunctive relief to prevent SB1 from becoming operative on July 1, 2004.

STANDARD

The Federal Rules of Civil Procedure provide for summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). One of the principal purposes of Rule 56 is to dispose of factually unsupported claims or defenses. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986).

Summary judgment is appropriate where, as here, a case hinges solely on questions of law. *See* Edwards v. Aquillard, 482 U.S. 578, 595-96 (1987).

ANALYSIS

In arguing that SB1 is expressly preempted by federal law, Plaintiffs have to show either that Congress has explicitly defined the extent to which its enactments displace state law (English v. Gen. Elect. Co., 496 U.S. 72, 78-79 (1990)), or alternatively that in the absence of such explicit language it can nonetheless be inferred that preemption should occur because federal regulation on the subject is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." (citation omitted.). Bank of America v. City & County of San Francisco, 309 F.3d 551, 558 (9th Cir. 2002). In determining whether federal law preempts state law, this Court's task is to "ascertain the intent of Congress. Id. at 557-58. Indeed, congressional purpose is the "ultimate touchstone" of preemption analysis. Oxygenated Fuels Ass'n Inc. v. Davis, 331 F.3d 665, 668 (9th Cir. 2003), citing Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 541 (2001).

In addition, because the provisions of SB1 relate to consumer protection vis-a-vis personal financial information (so as to prevent unfair business practices), the subject matter of the legislation extends to the state's historic police powers. *See* Cal. v. ARC Am. Corp., 490 U.S. 93, 101 (1989). This triggers a heightened presumption against preemption. Cipollone v. Liggett Group, Inc., 505 U.S. 504, 518 (1992) (In analyzing whether or not federal law expressly preempts state law, courts "must construe [the federal law] provisions in light of the presumption against the pre-emption of state police power regulations," thereby requiring a "narrow reading" of the federal law provision); Cal. v. ARC Am. Corp. 490 U.S. at 101 ("appellees must overcome the presumption against finding pre-emption of state law in areas traditionally regulated by the States...")); Gen. Motors Corp. v. Abrams, 897 F.2d 34, 41-42 (2d Cir. 1990) ("Because consumer protection law is a field traditionally regulated by the states, compelling evidence of an intention to preempt is required in this area.”).

With these guidelines in mind we now turn to the federal statutory scheme claimed by Plaintiffs to preempt SB1. The stated purpose and scope of the Fair Credit Reporting Act, as set forth in the first section entitled “Congressional findings and statement of purpose,” is to regulate consumer reporting agencies and ensure the accuracy and fairness of credit reporting. 15 U.S.C. § 1681. To that end, the FCRA monitors the compilation, dissemination and use of “consumer reports,” a term defined as including any communication by a consumer reporting agency of information bearing on specified characteristics used or expected to be used or collected in whole or part as a factor in determining a consumer’s eligiblility for credit, insurance, employment, or other specifically enumerated permissible purposes. 15 U.S.C. § 1681a(d)(1). The FCRA defines a consumer reporting agency as “any person which... regularly engages in... the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties...” 15 U.S.C. § 1681a(f).

Information not constituting a “consumer report” is not governed by the FCRA. *See, e.g.*, Individual Reference Serv. Group, Inc. v. Fed. Trade Comm’n, 145 F.Supp.2d 6, 17 (D.D.C. 2001)(“The FCRA does not regulate the dissemination of information that is not contained in a ‘consumer report.’”), *aff’d*, Trans Union LLC v. Fed. Trade Comm’n, 295 F.3d 42 (D.C. Cir. 2002). As noted by the Seventh Circuit in Ippolito v. WNS, Inc., 864 F.2d 440 (7th Cir. 1988),

> "not all report containing information on a consumer are "consumer reports." To constitute a "consumer report," the information contained in the report must have been "used or expected to be used or collected in whole or in part" for one of the purposes set out in the FCRA."

864 F.2d at 449.

The Ippolito court goes on to unequivocally conclude, on the basis of pertinent legislative history, that the FCRA does not apply to reports collected for "business, commercial or professional purposes" that do not fall within the purview of the FCRA as a "consumer report." Id. at 452.

In addition, the provisions of the FCRA itself make this distinction. The definition of a "consumer report" subject to the FCRA was amended in 1996 to exclude communication among affiliates of any report containing information solely as to transactions or experiences between the consumer and the person making the report. 15 U.S.C. § 1681(d)(2)(A)(ii). By excluding such information from the definition of a "consumer report," Congress made it clear that such information was not subject to the FCRA's requirements, which are not intended to regulate the simple sharing of information between affiliates.

The FCRA preemption provision upon which Plaintiffs premise their argument in this case must necessarily be viewed in the context of the statutory framework as a whole, especially since, as discussed above, in a preemption case like this one the preempting statute must be read both narrowly and with a

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presumption against finding preemption.[3] While Section 1681t(b)(2) does indicate on its face that "no requirement or prohibition may be imposed under the laws of any State... with respect to the exchange of information among persons affiliated by common ownership or common corporate control," it is a "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000), quoting Davis v. Mich. Dept of Treasury, 489 U.S. 803, 809 (1989); Exxon Mobil Corp. v. U.S. EPA, 217 F.3d at 1249 ("in interpreting the intent of Congress it is essential to consider the statute as a whole.").

To interpret the FCRA preemption provision as preventing any state regulation of information sharing between affiliates, as argued by Plaintiffs, ignores the fact that the FCRA expressly removed such information from the purview of the FCRA in Section

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[3]Although Plaintiffs urge the Court to focus solely on the "plain language" of the FCRA preemption statute, in isolation, the Supreme Court has recognized in a case involving statutory interpretation that "the meaning of words depends on their context." Shell Oil Co., v. Iowa Department of Revenue, 488 U.S. 19, 25 (1988). Shell Oil goes on to quote Judge Learned Hand's apt remark in this regard: "Words are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other but all in their aggregate take their purport from the setting in which they are used...'" Id. at 25, fn. 6 (citations omitted). Moreover, and even more specifically for purposes of the present case, in Medtronic v. Lohr, 518 U.S. 470, 485, the Supreme Court reiterated that while the analysis of the scope of [a] preemption statute begins with its text, the court's interpretation "does not occur in a textual vacuum." Also relevant is "the structure and purpose of the statute as a whole," as revealed by congressional purpose. Id. at 486. *See also* Dept. of Revenue of Oregon v. ACF Industries, 510 U.S. 332, 343-44 (1994).

1681a(d)(2)(A)(ii).[4] It makes no sense to exempt such information sharing in one part of the statute, then argue through a later preemption provision that the FCRA, though not governing such exchange, nonetheless prevents states from doing so. Instead, the only reasonable reading of the FCRA preemption provision is that it prevents states from enacting laws that prohibit or restrict the sharing of consumer reports among affiliates.[5] This comports with the stated purpose of the FCRA as regulating consumer reporting agencies to ensure the accuracy and fairness of credit reports. 15 U.S.C. § 1681. Contrary to the position espoused by Plaintiffs, the FCRA preemption provision does not broadly preempt all state laws regulating information sharing by affiliates, whatever the purpose or context.

Examination of Title V of the Gramm-Leach-Bliley Act of 1999, which sets forth basic privacy protections that must be provided to consumers by financial institutions, demonstrates that it, and not the FCRA, encompasses the kind of information sharing at issue in this case. The GBLA applies to information sharing by both affiliate organizations and non-affiliated third parties. With regard to affiliates, the GLBA requires that financial institutions disclose their policies and practices regarding the disclosure of customers' personal information. 15 U.S.C. § 6801(a)(1).[6] While the same requirement also applies to non-affiliates, at Section 6801(b) the GLBA further requires that financial institutions give consumers the ability to direct that information not be provided to non-affiliates at all.

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[4]In addition, the fact that the FCRA preemption statute specifically excludes a pre-existing Vermont credit reporting statute supports the proposition that the FRCA statute was not intended to preempt information sharing in non-credit reporting situations, since otherwise there would have been no need to reference the Vermont statute.

[5]Plaintiffs argue that because other preemption provisions of the FCRA, unlike Section 1681t(b)(2), do specifically reference consumer reports (see, for example, Section 1681t(b)(1)), Section 1681t(b)(2) must necessarily be read more broadly. That argument fails, however, simply because the FCRA does not regulate affiliate information sharing.

Significantly, the GLBA also contains a savings clause preserving the ability of states to afford more protection against dissemination of financial information than that specifically mandated by the GLBA itself. 15 U.S.C. § 6807 provides that a "state statute... is not inconsistent with the provisions of this subchapter if the protection such statute... affords is greater than the protection provided under this subchapter."

While the language of Section 6807 is clear in permitting states to enact stricter financial privacy laws like SB1, examination of the legislative history further confirms Congress' intent to allow more rigorous state regulation. The Conference Report for GLBA, which provides reliable evidence of congressional intent because it "represents the final statement of the terms agreed to by both houses" (Northwest Forest Res.

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[6]While the Northern District's decision in Bank of America v. City of Daly City, 279 F.Supp.2d 1118 (N.D. Cal. 2003) has been vacated by the Ninth Circuit and consequently lacks precedential authority (Durning v. Citibank, N.A., 950 F.2d 1419, 1424 n. 2 (9th Cir. 1991), its reasoning is faulty in any event. In finding the GLBA inapplicable, Daly City incorrectly determined that the GLBA does not regulate affiliate information sharing. This Court finds that the GLBA, unlike the FCRA, does in fact encompass general sharing of consumer information between affiliates.

Council v. Glickman, 82 F.3d 825, 835 (9th Cir. 1996), confirms that "[o]n privacy, States can continue to enact legislation of a higher standard that the Federal standard." 145 Cong. Rec. S13913, at S13915 (Nov. 4. 1999). Senator Sarbanes, who authored the state law savings clause that ultimately became Section 6807, explained as follows:

> [W]e were able to include in the conference report an amendment that I proposed which ensures that the Federal Government will not preempt stronger State financial privacy laws that exist now or may be enacted in the future. As a result, States will be free to enact stronger privacy safeguards if they deem it appropriate.

145 Cong. Rec. 213788, at S13789 (Nov. 3, 1999)(statement of Sen. Sarbanes).[7]

Consequently it is clear that Congress intended that states be afforded the right to regulate consumer financial privacy on behalf of their citizens in adopting statutes more protective in that regard than the provisions of the GLBA.[8] This permits state law like SB1, and weighs heavily against the preemption argument advanced by Plaintiffs. *See* Exxon Mobil Corp. v. U.S. EPA, 217 F.3d at 1254.

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[7]As summarized in the Points and Authorities in Support of Defendants Lockyer's and Garamendi's Motion to Dismiss (at 19:6-18), members of the House of Representatives interpreted the GLBA state-law savings clause in the same way. Representative LaFalce, the Ranking Member of the House Banking & Financial Services Committee, for example, stated that "the conference report totally safeguards stronger state consumer protection laws in the privacy area." 145 Cong. Rec. E2308, at E2310 (Nov. I, 1999)(statement of Rep. La Falce).

[8]While Plaintiffs contend that the savings clause of Section 6807 is limited only to Title V of the GLBA (given the statutory reference to "this subchapter"), that argument is of no real moment since the FCRA preemption clause is inapplicable to the subject matter presently before the Court in any event. Hence the cases cited by Plaintiffs for the proposition that a savings clause expressly limited to one act does not apply to other statutes (*see, e.g.*, United States v. Locke, 529 U.S. 89, 106 (2000)) are inapplicable. In addition, as indicated above, the legislative intent in permitting states to enact more protective privacy regulations appears clear.

Plaintiffs attempt to portray the GLBA as inapplicable because of a preemption clause recognizing the FCRA. That argument fails. Although Title V of the GLBA does recogize that "nothing in this title shall be construed to modify, limit, or supersede the operation of the Fair Credit Reporting Act," (15 U.S.C. § 6806), as demonstrated above the FCRA does not apply to general sharing of information by financial institutions with either affiliates or third party nonaffiliates.[9] Consequently Section 6806 was intended only to preserve the FCRA's specific consumer protections with respect to consumer reporting, and does not operate to limit the GLBA's explicit preservation, at Section 6807, of states' rights to enact more stringent financial privacy laws.

CONCLUSION

The Court finds that the provisions of SB1 are not preempted by the FCRA, whose overriding purpose is to regulate the use and dissemination of consumer reports. Instead, limitations on the sharing of personal financial information between financial institutions in non-credit reporting situations are specifically contemplated by the provisions of the GLBA, which allows states to enact more stringent privacy regulations in that regard, therefore permitting state laws like SB1. Plaintiffs' claim that SB1 must be invalidated consequently fails. Because Plaintiffs' entire lawsuit is premised on that contention, summary judgment on behalf of the Defendants is hereby granted.

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[9]Similarly, Plaintiffs' reliance on the Fair and Accurate Credit Transactions ("FACT") Act, which amended certain provisions of the FCRA in 2003, is also misplaced. While the FACT Act does impose restrictions on consumer solicitations for marketing purposes (at 15 U.S.C. § 1681s-3), it does not purport to regulate, like the GLBA, affiliate information sharing in general and does not evince any congressional intent to do so.

IT IS SO ORDERED.

DATED: JUN 30 2004

MORRISON C. ENGLAND, Jr.
UNITED STATES DISTRICT JUDGE

nac

United States District Court
for the
Eastern District of California
June 30, 2004

* * CERTIFICATE OF SERVICE * *

2:04-cv-00778

American Bankers

v.

Lockyer

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Eastern District of California.

That on June 30, 2004, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office, or, pursuant to prior authorization by counsel, via facsimile.

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